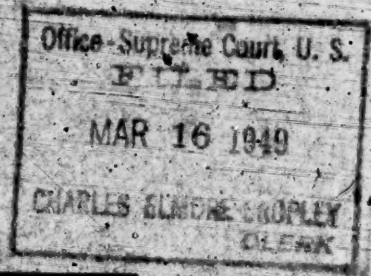


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No. 528



*In the Supreme Court of the United States*

OCTOBER TERM, 1948

HAROLD ROLAND CHRISTOFFEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE DIS-  
TRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the District Court (R. 10) deny-  
ing the motion to dismiss the indictment is not  
reported. The opinion of the Court of Appeals  
(R. 275-277) has not yet been reported.

### JURISDICTION

The judgment of the Court of Appeals was  
entered November 22, 1948 (R. 278), and a peti-  
tion for rehearing was denied December 14, 1948

(R. 284). On January 5, 1949, by order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to January 28, 1949 (R. 286), on which day the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45 (a), F. R. Crim. P.

#### QUESTIONS PRESENTED

Petitioner was convicted of perjury committed while testifying before the Committee on Education and Labor of the House of Representatives during that Committee's afternoon session on March 1, 1947. The principal questions presented are:

1. Whether the trial court was correct in charging the jury that, if a quorum of the Committee (a majority) met at the beginning of the afternoon session and no question was raised during the session as to a lack of a quorum, the fact that a majority did not actually remain throughout the session did not affect the Committee's competence to administer oaths and take testimony.
2. Whether petitioner should have been indicted under the federal perjury statute rather than under the local District of Columbia statute.
3. Whether the trial court was correct in refusing to dismiss the jury panel on the basis of defense counsel's allegation that the Government

had had an investigation of the panel made by the Federal Bureau of Investigation.

#### STATUTES INVOLVED

The federal perjury statutes (18 U.S.C. (1946 ed.) 231 and 232, Crim. Code, §§ 125, 126 (now 18 U.S.C. 1621 and 1622)), provided, as of the dates involved here:

SEC. 231. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than \$2,000 and imprisoned not more than five years.

SEC. 232. Whoever shall procure another to commit any perjury is guilty of subornation of perjury, and punishable as in section 231 of this title prescribed.

The District of Columbia perjury statute (22 D. C. Code (1940), 2501) provides:

Every person who, having taken an oath or affirmation before a competent tribunal, officer, or person, in any case in which the law authorized such oath or affirmation to be administered, that he will testify, declare, de-

pose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath or affirmation states or subscribes any material matter which he does not believe to be true, shall be guilty of perjury; and any person convicted of perjury or subornation of perjury shall be punished by imprisonment in the penitentiary for not less than two nor more than ten years. Any such false testimony, declaration, deposition, or certificate given in the District of Columbia, but intended to be used in a judicial proceeding elsewhere, shall also be perjury within the meaning of this section.

#### STATEMENT

On September 3, 1947, a six-count indictment was filed in the District Court for the District of Columbia charging petitioner with the commission of various perjuries while testifying before the Committee on Education and Labor of the House of Representatives. The indictment alleged generally that the Committee was engaged on March 1, 1947, in conducting hearings to inquire into the causes of labor disputes, work stoppages and strikes, and the connections those engaged in such activities might have with subversive organizations; that it became material to take sworn testimony to determine whether certain labor organizations in Milwaukee, Wisconsin, were controlled by members of the Communist Party or by persons committed to Communist doctrines

and purposes; that since petitioner had been in a dominant position in these labor organizations it became material to determine his connection with Communist organizations; and that petitioner appeared and testified under oath. The six counts of the indictment charged respectively that petitioner testified falsely and wilfully that he had never been a member of the Communist Party, that he had never been a member of the Communist Political Association, that he had never worked with either of those organizations, that he had never participated in the activities of the Communist Party, that he had never supported Communists or indorsed Communism, and that he did not know Ned Sparks or Fred Blair, both allegedly former heads of the party in Wisconsin. (R. 1-8.) The heading of the indictment referred to Section 2501 of Title 22 of the D. C. Code, *supra*, the District of Columbia perjury statute (R. 1).

Before trial, petitioner moved that the indictment be dismissed, the chief ground being that, since the alleged offense pertained to the Federal Government, the prosecution should have been brought under the federal perjury statute rather than under the District of Columbia perjury statute. The court denied the motion, holding that the indictment properly charged an offense under the federal statute, regardless of the statute in the mind of the indictment's drafters, and that

in any case there is no essential difference between the two statutes (R. 8-10).

Petitioner does not challenge the sufficiency of the evidence to prove that he testified falsely before the Committee, and that evidence has not been included in the printed record. Consequently, we do not stop to summarize it here.<sup>1</sup>

The Government presented evidence at the trial to show that the Committee was regularly constituted and that it was composed of 25 members (R. 30-32). The Committee clerk who took the roll at the afternoon session on Saturday, March 1, 1947, testified that 14 members of the Committee were present when that session opened shortly after 2:00 p.m. (R. 32-38); that the Committee adjourned at 5:25 p.m. (R. 34); that petitioner's testimony was given during the latter part of the session (R. 37, 49-52); and that he was not certain how many members were still present when petitioner was sworn and testified (R. 42, 69), but that at no time during the session did any member suggest the lack of a quorum (R. 39). The Chairman of the Committee and 12 other members testified that they were present at the beginning of the afternoon session (R. 86, 164, 181, 185, 191, 192, 198, 205, 208, 212, 219, 224, 229). The Chairman also testified that there was

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<sup>1</sup> In a stipulation filed in the court below petitioner in effect admitted that there was substantial evidence to prove that he had committed perjury (R. 272-273).

no suggestion during the session of a lack of a quorum (R. 112-113).

Throughout the trial, defense counsel insisted that the Government must prove that a quorum of the Committee was present at the exact time when petitioner was sworn and testified (see, e.g., R. 9, 33, 36-40, 120-138, 233-239). The court, however, ruled that the Government need only show that a quorum was present at the beginning of the session and that no point of lack of quorum was ever raised (R. 119). The court rejected instructions requested by the defense on this issue (R. 243-245), and instead instructed the jury as follows (R. 259-260):

And in this connection I wish to instruct you that the first thing that must be proved in this case is that the defendant was sworn to testify before a competent tribunal. If the tribunal before which he testified was not a competent tribunal, he cannot be convicted of perjury. The indictment alleges that the defendant testified before a meeting of the Committee on Education and Labor of the House of Representatives. To constitute a meeting of the Committee there must be present a majority of the Committee, and by present I mean actually physically present. In this case the Committee being composed of 25, before you could have a meeting of that Committee there must have been physically present at least 13 members of that Committee in the committee room. If such a Committee

so met, that is, if 13 members did meet at the beginning of the afternoon session of March 1, 1947, and thereafter during the progress of the hearing some of them left temporarily or otherwise and no question was raised as to the lack of a quorum, then the fact that the majority did not remain there would not affect, for the purposes of this case, the existence of that Committee as a competent tribunal provided that before the oath was administered and before the testimony of the defendant was given there were present as many as 13 members of that Committee at the beginning of the afternoon session. If you find that 13 members were not present at the beginning of the afternoon session on March 1, 1947, or have a reasonable doubt that they were, then of course you need go no further, because there would not be a competent tribunal in this case before which the testimony was given and your verdict should be not guilty.

The jury returned a verdict of guilty on all six counts of the indictment (R. 22, 268). The court granted a judgment of acquittal as to the second count (R. 22, 271), and imposed a general sentence of imprisonment for a period of two to six years on the other five counts (R. 23, 272).

In the Court of Appeals, counsel for petitioner stipulated that the only points "which will be made and argued by the appellant" would be the sufficiency of the indictment, the trial court's ruling on the quorum issue, and its refusal to dis-

miss the jury panel because of the alleged F.B.I. investigation of the panel members (R. 272-274). After the judgment had been affirmed (R. 278), a petition for rehearing was filed in which several new points were raised for the first time in the Court of Appeals: namely, the trial court's denial of a motion to transfer the cause from the District of Columbia to the Eastern District of Wisconsin, the denial of a defense request that certain witnesses be subpoenaed or their depositions taken at Government expense, and the trial court's refusal to permit defense counsel to read to the jury certain portions of the transcript of petitioner's testimony before the Committee (R. 282-283). The petition was denied without opinion (R. 284).

#### ARGUMENT

1. Petitioner's principal contention (Pet. 21-42) is that the trial court erred in ruling that the Committee was a competent tribunal within the meaning of the perjury statutes, no matter how many members were present at the exact time he took the oath and testified, so long as a majority were present at the beginning of the afternoon session and no member thereafter suggested the lack of a quorum.

Since the standing committees of the House of Representatives operate internally under the rules of the House itself, so far as applicable,<sup>2</sup>

<sup>2</sup> Rules of the House of Representatives, Rules and Manual of the United States House of Representatives, §738 (f).

we must look to the rules and practices of that body in order to determine whether the Committee was competent to act under the circumstances described. The Constitution prescribes that a majority of the House shall constitute a quorum to do business (Art. 1, § 5, cl. 1), but it establishes no method of determining the presence of a majority. On the contrary, it confers upon the House the authority to determine its own rules of procedure. Art. 1, § 5, cl. 2. Consequently, only the House itself can determine the presence or absence of a quorum of its members. It may prescribe any methods reasonably suited to ascertain the fact, *United States v. Ballin*, 144 U.S. 1, 6, and only by the use of those methods can the determination be made. Once a quorum has been attained at the beginning of a session and the House has begun to do business, its attention can be drawn to the fact that too many members have withdrawn by a member raising the point of no quorum, or by the Speaker of his own initiative, or by any vote which discloses on the face of it that too few are participating in the proceedings. The presence or absence of a quorum is then determined by a roll call or by the Speaker's own count. Riddick, *Congressional Procedure* (1941), p. 229; Cannon's *Procedure in the House of Representatives* (1939), pp. 277-278. The precedents of the House and Senate declare that when a quorum has been shown to be present and the session has legitimately begun to do business, the

business accomplished before the lack of a quorum has been brought to the notice of the chair cannot thereafter be challenged on that score. 4 *Hinds' Precedents*, §§ 2927, 2961, 4598, 4599; cf. 1 *Hinds' Precedents*, § 563. It is clear that the rules require a formal count by the House itself in order to settle the issue of presence or absence of a quorum.

The trial court could not substitute its own count in place of the formal count prescribed by the rules. Courts are bound to respect Congressional rules of procedure so long as they do not violate fundamental rights, *United States v. Smith*, 286 U.S. 6, 33; *United States v. Ballin*, 144 U.S. 1, 5, and certainly petitioner has not suggested that the alleged lack of a quorum affected his rights or occasioned any unfairness in the way the hearing was conducted. And it is clear that the court's instructions were in accord with the rules. The jury were told that, so long as they found that a quorum was present at the beginning of the session at which petitioner testified, they would have to find that the Committee continued legitimately in session until adjournment or until the lack of a quorum was brought to the notice of the chairman.

Petitioner cannot now resort to parole evidence (Pet. 27-28) to show a lack of a quorum which was not noticed in accordance with the proper procedure. *United States v. Ballin*, 144 U.S. 1,

4; cf. *Field v. Clark*, 143 U.S. 649, 667-680.<sup>3</sup> Nor is petitioner correct in his contention (Pet. 22-27) that the record of the hearings contains a roll call which showed on the face of it that a quorum was lacking at the time he testified. The chairman quite regularly called on each member of the committee present to ask if he desired to question the witness, and it is true that when petitioner was testifying less than a majority of the members were called upon in this manner. However, the witnesses agreed that this was not strictly intended as a roll call, for sometimes members who were actually present would not be called by name (R. 55-56, 90-91, 97).

In ultimate analysis, petitioner's elaborate argument fails because the Committee was properly operating under rules prescribed by the House of Representatives, because the House has the right to formulate its own rules, and because those rules cannot be challenged in the courts so long as they do not infringe upon fundamental rights.

2. Petitioner contends (Pet. 43-49) that the indictment should have been drawn under the federal perjury statute (*supra*, p. 3), rather than under that of the District of Columbia (*supra*, pp. 3-4). This same point was raised on

<sup>3</sup> There is no evidence that petitioner questioned the presence of a quorum at the Committee hearing, or indicated any unwillingness to testify in the absence of a quorum (R. 276).

petition for certiorari in the recent case of *Bennett E. Meyers v. United States*, No. 467, this Term, certiorari denied February 14, 1949, and we respectfully refer the Court to our Memorandum in Opposition in that case at pp. 9-11. As we pointed out there, the two statutes are substantially identical. The indictment in this case clearly states an offense under the federal statute, and the mere fact that the District of Columbia statute was cited in the caption is not ground for reversal unless prejudice is shown. *Williams v. United States*, 168 U.S. 382, 389; *United States v. Hutcheson*, 312 U.S. 219, 229; Rule 7(c), F. R. Crim. P. Petitioner claims there was prejudice because he was sentenced to a maximum of six years imprisonment whereas under the federal statute the maximum is five. But since petitioner was convicted on five separate counts<sup>4</sup> and was sentenced generally on all of them, the six-year term was well within the maximum that could have been imposed. *McKee v. Johnston*, 109 F. 2d 273, 275 (C.A.9), certiorari denied, 309 U.S. 664.

<sup>4</sup> Separate false statements are separately indictable even though all relate to the same general subject of inquiry, and all are made at the same hearing. *Seymour v. United States*, 77 F. 2d 577, 581 (C.A. 8); *United States v. Cason*, 39 F. Supp. 731, 734-735 (W.D. La.). It is obvious that the false statements ascribed to petitioner in the separate counts of this indictment, though all linked to the same general subject matter, each represented a different facet of his relations with the Communist Party.

3. While the jury panel was being examined, defense counsel stated to the court that he had noticed that the prosecuting attorneys had certain papers, apparently containing information about the prospective jurors, from the appearance of which he surmised that an F.B.I. investigation had been made of the panel. He asked that the panel be disqualified or that the information be made available to him. (R. 29-30.) The contention is now made that the refusal of this request constituted a denial of the constitutional right of trial by an impartial jury (Pet. 53-54).

Defense counsel offered nothing beyond his own speculation in support of his objection to the panel. The trial court was, therefore, clearly correct in refusing to disqualify the panel, since such objections must be supported by evidence of the truth of the allegations upon which they are based. *Smith v. Mississippi*, 162 U.S. 592; *Mamaux v. United States*, 264 Fed. 816, 819 (C.A. 6); *Wolf v. United States*, 292 Fed. 673, 678 (C.A. 6). Furthermore, even supposing that such an investigation had taken place, counsel offered not the slightest evidence, in fact he did not even allege, that any member of the panel was aware of it. There was, therefore, nothing to show that the panel was not impartial. Petitioner relies upon *Sinclair v. United States*, 279 U.S. 749, in which this Court held that any investigation of the jury which may reasonably tend to

destroy the equilibrium of the average juror is, even though the jury be unconscious of it, punishable as an act of contempt. 279 U.S. at 762-765. But here the issue was whether anything had actually happened to sway the panel from an impartial frame of mind. Of course, if evidence had been presented of some such offensive shadowing as occurred during trial in the *Sinclair* case, the trial court might well have exercised its discretion to quash the panel without waiting for proof that the jury had been affected. But defense counsel offered nothing more than a speculation, based upon his observance of certain papers in the possession of the prosecutor, that some sort of investigation had occurred. We think it clear that the court was correct in refusing to quash the panel, and we know of no authority which would require the prosecuting attorney to surrender his private notes to defense counsel.

4. Petitioner also contends that the trial court erred in denying his request that certain witnesses be brought from Wisconsin at Government expense or that their depositions be taken in Wisconsin (Pet. 49-52); and that it also erred in refusing to permit him to read the balance of the transcript of the Committee hearings to the jury after the Government had introduced it in evidence and read certain portions (Pet. 55-56). By stipulation (R. 272-274), petitioner abandoned these points in the Court of Appeals, and then

sought to revive them after decision by a petition for rehearing (R. 282-284). It is settled that the courts of appeals need not consider issues raised for the first time on petition for rehearing unless a clear miscarriage of justice would result. *Nailling v. United States*, 142 F. 2d 551 (C.A. 6); *Lee v. United States*, 91 F. 2d 326, 332 (C.A. 5), certiorari denied, 302 U.S. 745; *Tinkoff v. United States*, 86 F. 2d 868, 884 (C.A. 7), certiorari denied, 301 U.S. 689. And this Court will not consider issues not passed on in the courts of appeals. *Sonzinsky v. United States*, 300 U.S. 506, 514; *Hasty v. United States*, 282 U.S. 694, 701-702. There is nothing in the petition to show a clear miscarriage of justice.

#### CONCLUSION

The decision of the Court of Appeals is correct and no conflict of decisions is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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MARCH 1949.